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In the Supreme Court of the United States

OCTOBER TERM, 1992

DAVID P. BUCKLEY, AVIATION ANTISUBMARINE WARFARE OPERATOR SECOND CLASS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the United States Constitution's Appointments Clause preclude Congress from granting the Judge Advocate General of the Navy the power to appoint military trial judges?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, David P. Buckley, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 24, 1992.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Buckley,* 35 M.J. 262 (C.M.A. 1992), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Buckley,* No. 90-0462 (N.M.C.M.R. Mar. 8, 1991), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 24, 1992. 28 U.S.C.A. § 1259(3) (West Supp. 1992) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

CONSTITUTIONAL PROVISION, STATUTE, REGULATION, AND MEMORANDUM INVOLVED

The pertinent portion of Art. II, § 2 is set forth in Appendix C. The text of 10 U.S.C. § 826 is set forth in Appendix D. The text of Rule for Courts-Martial 801 is set forth in Appendix E. The text of Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992), is set forth in Appendix F.

STATEMENT OF THE CASE

At a general court-martial, petitioner was convicted, contrary to his pleas, of one count of having sexual intercourse with a female under the age of sixteen and one count of rape in violation of 10 U.S.C. § 920, and one count of obstruction of justice in violation of 10 U.S.C. § 934. He was sentenced to confinement for ten years, forfeiture of $300 pay per month for 120 months, reduction to the lowest enlisted rank, and separation from the Navy with a dishonorable discharge. The Chief of Naval Technical Training mitigated petitioner's sentence to include only confinement for two years, forfeiture of $300 pay per month for 24 months, reduction to pay grade E-1, and separation from the Navy with a bad-conduct discharge. On appeal, the Navy-Marine Corps Court of

Military Review affirmed. *United States v. Buckley*, No. 90-0462 (N.M.C.M.R. Mar. 8, 1991). The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioner's allegation that the trial judge failed to give the members a required instruction. A divided Court of Military Appeals rejected petitioner's argument and affirmed the Navy-Marine Courps Court's decision. *United States v. Buckley*, 35 M.J. 262 (C.M.A. 1992).

REASON FOR GRANTING THE WRIT

CONGRESS' PLACEMENT OF THE POWER TO APPOINT MILITARY TRIAL JUDGES IN THE JUDGE ADVOCATES GENERAL IS A STRUCTURAL CONSTITUTIONAL DEFECT IN THE MILITARY JUSTICE SYSTEM WHICH DEMANDS IMMEDIATE ATTENTION.

Each year, thousands of service members are tried by courts-martial. In Fiscal Year 1991, for example, there were 2,610 general courts-martial and 5,538 special courts-martial.[1] Annual Report on Military Justice, 34 M.J. LVII, CV, CXIX, CXXXII, CXLII (1991). The judges who preside over general courts-martial are, for all practical purposes, the equivalent of United States District Court judges presiding over felony trials. A general court-martial judge has far-ranging powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to

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[1] General courts-martial can impose any authorized sentence including, in some cases, death. 10 U.S.C. § 818 (1988). Special courts-martial, on the other hand, may impose no more than six months' confinement. 10 U.S.C. § 819 (1988). Special courts-martial can, however, sentence service members to be separated with a bad-conduct discharge. *Id.*

"exercise contempt power."[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801(a)-(b). In a case where the accused chooses a bench trial, a court-martial judge has even more discretion than a federal distict court judge because the court-martial judge is not constrained by the Federal Sentencing Guidelines. *See United States v. Brown,* 28 M.J. 470, 474 n.3 (C.M.A. 1989); *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.[3]

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. Art. II, § 2, cl. 2. Congress can devolve appointment authority upon no other official. *Freytag v. Commissioner of Internal Revenue,* 111 S. Ct. 2631, 2642 (1991). There can be little doubt that military trial judges, who exercise extraordinary authority and discretion, are Officers of the United States. *See Buckley v. Valeo,* 424 U.S. 1, 126 (1976) (per curiam). Yet Congress vested the power to appoint military trial judges in the Judge Advocates General.

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[2] "A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both." 10 U.S.C. § 848 (1988).

[3] "Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized by this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment."

10 U.S.C. § 826. Allowing such low-level officials[4] the power to appoint judges raises a serious question under the Appointments Clause.

As in *Freytag*, "[i]t is beyond question . . . that Congress did not intend to grant to the President the power" to appoint military trial judges. 111 S. Ct. at 2642. Nor is the Judge Advocate General of the Navy, who is a subordinate of the Secretary of the Navy, 10 U.S.C.A. § 5148 (West Supp. 1992), a Head of a Department. It is self-evident that the Judge Advocate General of the Navy, who is by statute an Executive Branch officer tasked with performing legal duties "under the direction of the Secretary of the Navy," *id.* at § 5148(b), (d), is not a "Court of Law." Thus, Congress gave the power to appoint military trial judges to an impermissible official.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag,* 111 S. Ct. at 2638. This concern is directly implicated by allowing the Judge Advocates General to appoint military trial judges. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments

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[4] The Judge Advocates General are not even the primary legal advisors in their respective services. Rather, "The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense." Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992) [Appendix F].

> Clause does not always serve the Executive's interest. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S. Ct. at 2639 (emphasis added).

The significance of the Appointments Clause defect is magnified because military trial judges serve without the protection of a fixed term of office. *See generally United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). Thus, not only are military trial judges *appointed* by the Judge Advocate General, they serve at the pleasure of the Judge Advocate General, who may *remove* them from office. Giving the Judge Advocates General the power of appointment and removal carries the risk that these powers will be used to advance their parochial interests.

The appointment of military trial judges in violation of the Appointments Clause is a serious constitutional defect which the Court should address immediately. In *Freytag*, the Court indicated that "[t]he alleged defect in the appointment of the special trial judge goes to the validity of the Tax Court proceeding that is the basis for this litigation." 111 S. Ct. at 2639. This comports with the Court's earlier recognition that individuals appointed in violation of the Appointments Clause may not be involved in "the administration and enforcement of the public law[.]" *Buckley v. Valeo*, 424 U.S. at 139. Thus, until Congress places the power to appoint military trial judges in a constitutionally permissible official, every court-martial is invalid.

Two of the Courts of Military Review have recently addressed whether the Judge Advocates General may constitutionally appoint military judges. For different reasons, both the Coast Guard and Navy-Marine Corps Courts of Military Review affirmed the practice. *United States v. Prive,* 35 M.J. 569 (C.G.C.M.R. 1992); *United States v. Coffman,* 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam). Neither court's reasoning, however, can withstand scrutiny.

In *United States v. Prive,* 35 M.J. 569 (C.G.C.M.R. 1992), the Coast Guard Court of Military Review expressly held that general court-martial judges are officers, not mere employees, of the United States. 35 M.J. at 572-73. The Coast Guard Court, however, held that Congress is not bound by the Appointments Clause when exercising its Article I, Section 8, Clause 14 powers to regulate the land and naval forces. 35 M.J. at 576-77. This holding is inconsistent with this Court's command that "[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions." *Buckley v. Valeo,* 424 U.S. 1, 132 (1976) (per curiam). Thus, *Prive* was wrongly decided.

In *United States v. Coffman,* 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam), the Navy-Marine Corps Court of Military Review held that the method by which military trial judges are appointed satisfies the Appointments Clause because all of those judges had earlier been appointed and confirmed as military officers. 35 M.J. at 592. This argument, however, misses the whole point of the Appointments Clause. While the trial judge in this case was appointed by the President *as a military officer,* he was not appointed by the President *as a judge.* Judge

Clark had the authority to preside over petitioner's trial *not* because Judge Clark was a Marine Corps lieutenant colonel, but because he was filling the office of general court-martial judge. The *independent* judicial authority which Judge Clark and other military trial judges wield is quite different from the structured, accountable authority which other military officers exercise.

Coffman relied in part on *Shoemaker v. United States*, 147 U.S. 282 (1893). 35 M.J. at 592. This reliance, however, is misplaced. Judge Lamberth emphasizes, "[T]he provision challenged in *Shoemaker* added certain duties to two *offices*; it did not confer additional responsibilities on any particular *officer*." *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1192 (D.D.C. 1990). *Shoemaker* is entirely irrelevant to the question of how military trial judges are appointed because Congress did not provide that service as a judge is an additional duty of a designated *office*. A general court-martial judgeship is not an appurtenance of some other position. Rather, it is an office unto itself. Unlike the two military officers at issue in *Shoemaker*, military trial judges do not serve *ex officio*. Thus, *Shoemaker* does not resolve the Appointments Clause issue.

Although this issue was not raised below, the Court should not treat it as waived or forfeited. *See Freytag*, 111 S. Ct. at 2647 n.2 (Scalia, J., concurring). As noted in *Freytag*, the Court "has exercised its discretion to consider nonjurisdictional claims that have not been raised below." 111 S. Ct. at 2639 (citing, *inter alia*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962)). The Court emphasized, "*Glidden* expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections

that could be considered on appeal whether or not they were ruled upon below." *Freytag,* 111 S. Ct. at 2639. Due to this issue's importance to the military justice system and to the rule of Constitutional law, the Court should hear the Appointments Clause issue.

Finally, the Court has jurisdiction to resolve the Appointments Clause question even though the Court of Military Appeals did not grant review on this issue. The Military Justice Act of 1983, which established the Court's certiorari jurisdiction over Court of Military Appeals decisions, limited the Court's certiorari jurisdiction to cases in which the Court of Military Appeals exercised mandatory jurisdiction, cases in which the Court of Military Appeals granted review of a case, and other cases in which the Court of Military Appeals granted relief. Military Justice Act of 1983, § 10(a)(1), 97 Stat. 1405, 1406 (1983) (codified at 28 U.S.C.A. § 1259 (West Supp. 1992); *see also* 10 U.S.C.A. § 867a (West Supp. 1992)). The Military Justice Act of 1983's legislative history indicates, "In view of current concerns about the Supreme Court's docket, the legislation has been drafted in a manner that will limit the number of cases subject to direct Court review." H.R. Rep. NO. 549, 98th Cong., 1st Sess. 16-17 (1983). The number of cases subject to review is the same regardless of whether the Court's certiorari jurisdiction is limited to issues actually considered by the Court of Military Appeals. Thus, the limitation's purpose was not to insulate certain issues from review by the Court, but rather to prevent an intolerable increase in the Court's workload. The Court may, in the exercise of its judicial discretion, review any issue in a case which meets 28 U.S.C. § 1259's requirements.

CONCLUSION

The manner in which military trial judges are appointed presents a serious constitutional issue: may Congress vest the power to appoint Article I court judges in an official who is statutorily subordinated to the Secretary of a Department? The judges who are now selected by the Judges Advocates General preside over thousands of courts-martial every year. These judges, who wield awesome authority over the defendants who come before them, should be selected in conformance with the Appointments Clause. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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DECEMBER 1992

APPENDIX A

U.S. COURT OF MILITARY APPEALS.

No. 66,374.
NMCM 90 0462.

UNITED STATES, APPELLEE,

v.

DAVID P. BUCKLEY, AVIATION ANTISUBMARINE WARFARE OPERATOR SECOND CLASS, U.S. NAVY, APPELLANT.

Argued May 5, 1992.
Decided Sept. 24, 1992.

For Appellant: *Captain Dwight H. Sullivan,* USMC (argued).

For Appellee: *Lieutenant J.C. Foster,* JAGC, USNR (argued); *Colonel T.G. Hess,* USMC (on brief); *Commander Thomas W. Osborne,* JAGC, USN.

OPINION OF THE COURT

COX, Judge:

Appellant was tried by a general court-martial consisting of officer members at the Naval Legal Service Office, Naval Air Station (NAS) Memphis, Millington, Tennessee.[1] Contrary to his pleas, he was found guilty of

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[1] Appellant was sentenced to 10 years' confinement, forfeiture of $300 pay per month for 120 months, reduction to pay grade E-1, and a

violating Articles 120 (carnal knowledge with victim B[2] and rape of victim A) and 134 (obstruction of justice and communicating a threat), Uniform Code of Military Justice, 10 USC §§ 920 and 934, respectively.

It is undisputed that victim A, a 20-year-old female Navy Airman [Petty Officer Third Class (E-4)], went to the enlisted club on board the NAS Memphis, on the night of March 24, 1989, with a friend. Upon entering the club, she greeted and approached an acquaintance, appellant. She then joined his group in their consumption of several pitchers of beer. During the evening, she became intoxicated and danced with many men, possibly including appellant. At the end of the evening, appellant gave her a ride to her barracks. While in the barracks parking lot, they discussed appellant's fishing trip of the next day and whether she might join the excursion. Furthermore, it was decided that she would spend the night at appellant's barracks in the extra rack. Once in the room, the victim voluntarily climbed onto the bed, removed her shoes, and allowed appellant to massage her shoulders. From this point, two different stories emerged as to what happened.

Appellant's version is as follows:

> While dancing with appellant, the victim seductively pressed her body against his and made sexual ad-

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dishonorable discharge. The convening authority approved the findings and the sentence except for reducing confinement and the period of forfeitures from 10 to 2 years and changing the discharge to a bad-conduct discharge. The Court of Military Review affirmed the findings and sentence as approved below in an unpublished opinion.

[2] The carnal-knowledge charge involved intercourse with victim B, a 14-year-old civilian girl. On September 15, 1988, victim B was drinking with friends. A stranger to victim B, appellant, joined this group. Later, he took the intoxicated victim B to his barracks where she awoke to find him engaged in sexual intercourse with her. Thereafter, she did not leave the room or report it to the authorities. The conviction of this charge was discussed in the opinion below.

vances. Even at the club, she kissed him and put her arm around him. These sexual advances progressed in the parking lot of her barracks as they kissed and fondled one another. She then asked if she could sleep at his barracks, because she knew he did not have a roommate. Additionally, appellant insisted that she requested the massage which led to her removing her clothes and her full consent to the three occurrences of sexual intercourse. When she left the next morning, she kissed him goodbye.

Disagreeing with appellant's statements, the victim maintains that the incidents were quite different:

She states that she never made any sexual advances in regard to appellant, did not remove her clothes, and never consented to having sexual relations with appellant. Though she did not request the massage, she did enjoy it. The combination of the massage and the alcohol put her to sleep. Later, she was jarred to consciousness by appellant's penetrating her from behind while she lay on her stomach. Feeling shocked and drunk, she pushed appellant away and went into the bathroom. When she returned to the bedroom, she wrapped herself in a blanket and confronted appellant about what he had done. He apologized and asserted that he thought she had been awake, then he went to the other empty rack. In her drunken and confused state, she curled up in the fetal position and turned towards the wall. Twice later, appellant attempted to engage in sexual intercourse with her to which she responded "no." Appellant finally gave up and returned to his rack to sleep. In the morning, she walked to her barracks without going fishing with appellant and had no further physical contact with him.

The next morning, March 25, the victim told her classmate about the incident. On March 27, a Monday afternoon, she reported the occurrence to the authorities; first to her instructors, then to NAS security Investigator

Melenbacher. In her first statement to NAS security, she lied by stating that she had left the room after having been raped by appellant; however, she had actually remained in the room. The next week, about Wednesday or Thursday, she admitted to the Naval Investigative Service that she had initially lied.

We are called upon to decide whether this evidence "reasonably raised" the affirmative defense of "honest and reasonable mistake of fact." *United States v. Taylor,* 26 MJ 127, 128 (CMA 1988); *United States v. Carr,* 18 MJ 297 (CMA 1984); *see also* para. 45, Part IV and RCM 916(j), Manual for Courts-Martial, United States, 1984.[3] If it did, the military judge was required to give an instruction as to the elements of that defense, *sua sponte.* 18 MJ at 302.

On initial review of the case, the Court of Military Review concluded that

> the defense of mistake of fact was [not] raised by the evidence. There were only two possible versions of what happened to Victim A, in the barracks room, both were presented to the members. The [sic] Victim A testified that appellant raped her as she slept. Appellant maintained that he engaged in consensual sexual intercourse with Victim A on three separate occasions. . . . If the members believed appellant's version, the victim consented three times. There was no

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[3] The granted issue is:

> WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED BY RULING THAT THE MILITARY JUDGE WAS NOT REQUIRED TO *SUA SPONTE* INSTRUCT THE MEMBERS CONCERNING THE AFFIRMATIVE DEFENSE OF MISTAKE OF FACT WHERE AN ALLEGED RAPE VICTIM VOLUNTARILY ENTERED THE ACCUSED'S ROOM, CLIMBED ONTO A BED, AND ALLOWED THE ACCUSED TO MASSAGE HER SHOULDERS.

middle ground and no evidence that appellant received a "mixed message" of consent or non-consent.

Unpub. op. at 3.

Apparently, trial defense counsel agreed, for although he argued vigorously for a mistake-of-fact defense as to the age of the second victim, he did not request a like instruction as to Victim A.[4] In any event, we agree with the Court of Military Review that the defense of "honest and reasonable mistake of fact" was not "reasonably raised" by the evidence. "[F]rom our reading of the record and in view of the absence of any defense contention at trial that there was a reasonable mistake of fact and the absence of any request for instructions thereon, we are convinced that this defense was not raised at trial." *United States v. Peel,* 29 MJ 235, 242 (CMA 1989), *cert. denied,* 493 U.S. 1025, 110 S. Ct. 731, 107 L.Ed.2d 750 (1990).

The decision of the United States Navy-Marine Corps Court of Military REview is affirmed.[5]

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[4] Defense counsel used the mistake-of-fact defense in regard to victim B to show appellant's misunderstanding of her exact age to eliminate the charge of wrongfully supplying alcohol to a minor. Art. 134, Uniform Code of Military Justice, 10 USC § 934. Thus, this counsel knew the intricacies of mistake of fact.

[5] This footnote is the author's personal observation and not part of the principal opinion. The colorful dissent of my wise colleague, Judge Wiss, fails to consider that the evidence of record only presents the red of the spectrum or the blue, depending upon the eye of the factfinder. As a practical matter, it is up to the *defense* to create the hues which lie between the two extremes either through cross-examination or its own evidence. *The World Almanac and Book of Facts* 305 (1992) offers the following information about the "Colors of the Spectrum":

> Color, an electromagnetic wave phenomenon, is a sensation produced through the excitation of the retina of the eye by rays of light. The colors of the spectrum may be produced by viewing a

Judge CRAWFORD concurs.

SULLIVAN, Chief Judge (concurring with reservation):

I concur in the principal opinion, except for footnote 5, which I do not join.

GIERKE, Judge (dissenting):

In this case the victim testified on direct examination that she awakened to find appellant having intercourse with her. She pushed him away, went to the bathroom, and then "confronted him with what he had done." According to the victim, appellant responded, "I'm sorry, I

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light beam refracted by passage through a prism, which breaks the light into its wave lengths.

Customarily, the primary colors of the spectrum are throught of as those 6 monochromatic colors that occupy relatively large areas of the spectrum: red, orange, yellow, green, blue, and violet. However, Sir Isaac Newton named a 7th, indigo, situated between blue and violate on the spectrum. Aubert estimated (1865) the solar spectrum to contain approximately 1,000 distinguishable hues of which according to Rood (1881) 2 million tints and shades can be distinguished; Luckiesh stated (1915) that 55 distinctly different hues have been seen in a single spectrum.

Many physicists recognize only 3 primary colors: red, yellow, and blue (Mayer, 1775); red, green, and violate (Thomas Young, 1801); red, green, and blue (Clerk Maxwell, 1860).

The color sensation of black is due to complete lack of stimulation of the retina, that of white to complete stimulation. The infra-red and ultra-violate rays, below the red (long) end of the spectrum and above the violate (short) end respectively, are invisible to the naked eye. Heat is the principal effect of the infra-red rays and chemical action that of the ultra-violet rays.

thought you were awake." When the victim was asked if she thought appellant was a threat, she responded, "I was scared by what had happened, and nervous he had given up so easy, because it didn't make sense to me, but I didn't feel in any danger, sir."

In my view the victim's testimony was sufficient to raise an issue whether appellant mistakenly thought that the victim was awake and consenting to his sexual advances, thereby requiring an instruction on the affirmative defense of mistake of fact. The military judge has an affirmative duty *sua sponte* to instruct on affirmative defenses raised by the evidence. An instruction on an affirmative defense is not waived by a mere failure to request it. *United States v. Taylor,* 26 MJ 127, 129 (CMA 1988). I disagree with Judge Cox's implication (35 MJ at 264 n.5) that it is up to the defense to raise an affirmative defense. We have held that "the defense theory" of the case "is not dispositive in determining what affirmative defenses have been reasonably raised by the evidence." *Id.* at 131; *United States v. Steinruck,* 11 MJ 322, 324 (CMA 1981).

I also agree with Judge Wiss that the principal opinion's conclusion in this case invades the prerogative of the court members to decide, under proper instructions, what the truth is.

Accordingly, I dissent.

WISS, Judge (dissenting):

Just as a color speetrum does not have distinct points at which the colors sharply change but, instead, reflects shadings of one color into the next, superficially different views of the facts of a certain incident often do not stand in marked contrast but, instead, shade one into the other.

The factfinders in this case were presented with two versions of what happened between appellant and the complaintant over the course of several hours in both public and private fora. The Court of Military Review and the majority of this Court see those versions as distinctly different, just as the colors on each extreme of a spectrum are distinctly different. I do not disagree.

The difficulty I have with the majority and with the court below is the failure of both to recognize the reasonable possibility that the factfinders might *fully* accept *neither*. As I view the evidence, the truth might be as appellant tells the story; or it might be as the complainant tells the story. But it also might be somewhere in between.[1]

Unfortunately, this case represents yet another instance in which the military judge, the Court of Military Review, and a majority of this Court are making judgments which, *ab initio,* are the responsibility and prerogative only of the members as factfinders. *See United States v. Rankins,* 34 MJ 326 (CMA 1992). I am unsure what motivates the reluctance of judges at all these levels to give an accused's case a fair hearing by letting the *members* decide on the evidence, under full and proper instructions, where the truth lies.[2] Whatever it is that motivates this

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[1]As this Court recognized in another context in *United States v. Warren,* 13 MJ 278, 286 (CMA 1982), quoting the admonition offered in *United States v. Moore,* 484 F.2d 1284, 1287-88 (4th Cir.1973):

> "[S]ome essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. Judges must constantly bear in mind that neither they nor jurors are infallible."

[2] As for Judge Cox's implication in footnote 5 that the evidence raising an affirmative defense *must* come from the *defense,* I know of no authority supporting that view. *Cf. United States v. Taylor,* 26 MJ 127, 131 (CMA 1988); *United States v. Steinruck,* 11 MJ 322, 324

judicial stinginess, I do not share it. *See id.* at 336-40 (Wiss, J., dissenting).

(CMA 1981). Notwithstanding the introductory caveat in the particular sentence that this is true only '[a]s a practical matter," the majority's cold-shoulder response in the body of the opinion to the testimony of the complainant that, as Judge Gierke points out, does raise the defense, belies his implied willingness to consider other sources.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

BEFORE

E. M. ALBERTSON WALTER J. LANDEN, SR.
R. A. STRICKLAND

NMCM 90 0462

UNITED STATES

v.

DAVID P. BUCKLEY, 248 23 627
AVIATION ANTISUBMARINE WARFARE OPERATOR
SECOND CLASS (E-5), U.S. NAVY

Decided 8 March 1991

Sentence adjudged 20 September 1989. Military Judge: E. D. Clark, Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Technical Training, Naval Air Station Memphis, Millington, TN 38054-5056.

LCDR P.MCNEILL JONES, JAGC, USN, Appellate Defense Counsel

LT DEBRA R. SANDIFER, JAGC, USNR, Appellate Defense Counsel

LT ROSALYN D. CALBERT, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

Summary of Proceedings

Appellant was tried by general court-martial composed of officer members, and contrary to his pleas, was convicted of violations of Articles 120 (carnal knowledge and rape), and 134 (obstruction of justice and communicating a threat) of the Uniform Code of Military Justice. 10 U.S.C. §§ 920 and 934. He was sentenced to confinement for 10 years, forfeiture of $300.00 pay per month for 120 months, reduction to pay grade E-1 and a dishonorable discharge. The convening authority approval only so much of the sentence as provided for confinement for 2 years, forfeiture of $300.00 pay per month for 24 months, reduction to pay grade E-1, and a bad-conduct discharge. Appellant on appeal raises four assignments of error.[1]

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[1] I. THE RECORD OF TRIAL DOES NOT SATISFY THE REQUIREMENTS OF RULE FOR COURTS-MARTIAL (R.C.M.) 1103(b)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984, FOR A VERBATIM WRITTEN TRANSCRIPT OF ALL SESSIONS EXCEPT SESSIONS CLOSED FOR DELIBERATIONS AND VOTING.

II. THE MILITARY JUDGE ERRED IN NOT, SUA SPONTE, GIVING AN INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF MISTAKE OF FACT BASED UPON THE EVIDENCE ADMITTED ON SPECIFICATION 2 OF CHARGE II.

Facts

Victim A testified that on the evening of 24 March 1989 she went to the enlisted club and joined appellant and several others at a table. During the ensuring three hours she danced with individuals seated at the table and joined them in eating pizza and drinking between four and six pitchers of beer. Feeling intoxicated the victim at approximately 2200 decided to leave the club and return to her barracks. The accused offered to give her a ride, which she accepted. The accused drove her to the parking lot behind her barracks where they discussed going fishing the next morning. Appellant informed the victim that he had an extra bed in his room. He invited her to spend the evening stating that she could get up in the morning and go fishing with him and his friend. She accepted the invitation. The accused then drove to the parking lot behind his barracks. The couple went to his BEQ room, she lay down on a bed and appellant massaged her shoulders and she fell asleep. She testified that when she awoke she was on her stomach, appellant was on top of her and engaging in vaginal intercourse (R. 243-248). Victim A remained in the room, leaving at approximately 0715 the next morning.

The afternoon of 25 March 1989 Victim A told a friend about what had happened, but did not report the incident until the afternoon of 27 March 1989 and then only after somebody else had reported the matter to security.

In regard to Specification 1 of Charge II Victim B was 14 years old at the time of the offense. Victim B testified

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III. THE GOVERNMENT FAILED TO PROVE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT, TO THE OFFENSE OF RAPE.

IV. A SENTENCE WHICH INCLUDES CONFINEMENT FOR TWO YEARS AND A BAD CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE.

she met appellant outside the enlisted club. Even though she had been drinking she considered herself to be sober. She and her friends proceeded to the lounge area of appellant's barracks where she began drinking tequila from a bottle supplied by appellant. Upon leaving the lounge area, victim B testified that her judgment and awareness were impaired. Everyone proceeded to a motel where victim B consumed six or seven shots of straight whisky. She testified that at this point in time she was drunk to the point where she could not stand up straight and everything was blurry. Victim B, appellant and a third person then proceeded to a 7-Eleven to get a soda. Victim B passed out, the next thing she remembers is waking up in appellant's bed, in his barracks room, and appellant engaging in sexual intercourse with her.

DISCUSSION

The two scenarios set forth above clearly demonstrate appellant's *modus operandi* in regard to intimate relations with women. He preyed upon intoxicated women in need of assistance. He would offer them assistance, take them to his barracks room, wait until they passed out, remove their clothing and then engage in sexual intercourse with the "sleeping victim." We believe appellant's *modus operandi* was just as apparent to the members as it is to us.

The military judge did not give a mistake of fact instruction as to Specification I, Charge II nor did defense counsel request such an instruction. The military judge has a duty to *sua sponte* instruct on mistake of fact when evidence raises such issues in a rape case. *United States v. Taylor,* 28 M.J. 127 (C.M.A. 1988). However, we do not believe the defense of mistake of fact was raised by the evidence. There were only two possible versions of what happened to Victim A, in the barracks room, both were

presented to the members. The Victim A testified that appellant raped her as she slept. Appellant maintained that he engaged in consensual sexual intercourse with Victim A on three separate occasions. If the members believed Victim A, there was no consent since she was incapable of consenting while she slept. If the members believed appellant's version, the victim consented three times. There was no middle ground and no evidence that appellant received a "mixed message" of consent or non-consent. This case turned solely on the credibility of the victim versus that of appellant. *See United States v. Eck*, 28 M.J. 1046 (A.C.M.R. 1989). We are convinced beyond a reasonable doubt of appellant's guilt of the offenses of which he was convicted.

We note that pursuant to an order of this Court the audio recordings of the court-martial proceedings were made available to appellant on 3 October 1990. Appellant informed this Court on 8 November 1990 that no additional pleadings would be filed concerning this assignment of error. We are satisfied the record of trial meets the requirements of Rule For Courts-Martial 1103, Manual For Courts-Martial, United States, 1984. *See United States v. McCallum,* 31 M.J. 882 (N.M.C.M.R. 1990). We find this assignment and the remaining assignment of error to be without merit.

We have examined the record of trial, the assignments or error, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the accused was committed.

Accordingly, the findings of guilty and sentence, as approved on review below, are affirmed.

E. M. ALBERTSON, Senior Judge

WALTER, J. LANDEN, SR., Judge

R. A. STRICKLAND, Judge

APPENDIX C

U.S. Const. art. II. § 2

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

APPENDIX D

10 U.S.C. §826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military

judge is a member and many perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

APPENDIX E

Manual for Courts-Martial, United States, 1984,
Rule for Courts-Martial 801

Rule 801. Military judge's responsibilities; other matters

(a) *Responsibilities of military judge.* The military judge is the presiding officer in a court-martial.

The military judge shall:

(1) Determine the time and uniform for each session of a court-martial;

(2) Ensure that the dignity and decorum of the proceedings are maintained;

(3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purpose of these rules and this Manual;

(4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

(5) Insturct the members on questions of law and procedure which may arise.

(b) *Rules of court; contempt.* The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) *Obtaining evidence.* The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

(d) *Uncharged offenses.* If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial,

the court-martial shall proceed with the trial of the offense charged.

(e) *Interlocutory questions and questions of law.* For purposes of this subsection "military judge" does not include the president of a special court-martial without a military judge.

(1) *Rulings by the military judge.*

(A) Finality of rulings. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(B) *Changing a ruling.* The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) *Article 39(a) sessions.* When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803.

(2) *Rulings by the president of a special court-martial without a military judge.*

(A) *Questions of law.* Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) *Questions of fact.* Any ruling by the president of a special court-martial without a military judge on any interlocutory question of fact, including a factual issue of

mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(c) *Changing a ruling.* The president of a special court-martial without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) *Presence of members.* Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) *Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member.*

(A) *Determination.* The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) *Instructions.* When a ruling by the president of a special court-martial without a military judge is subject to objection, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members

to understanding the issue and the legal standards by which they will determine it if objection is made.

(C) *Voting.* When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(D) *Consultation.* The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) *Standard of proof.* Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.

(5) *Scope.* Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

(f) *Rulings on record.* All sessions involving rulings or instructions made or given by the military judge or the

president of a special court-martial without a military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] "military judge" does not include the president of a special court-martial without a military judge.

(g) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

APPENDIX F

[SEAL] [SEAL]

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-1000

March 3, 1992

MEMORANDUM FOR:

SECRETARIES OF THE MILITARY DEPARTMENTS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Ensuring Execution of the Laws and Effective Delivery of Legal Services

Among the chief duties of the Secretary of Defense and the Secretaries of the Military Departments is the faithful execution of the laws of the United States. Effective performance of that duty requires that the Department of Defense have a single chief legal officer and that each Military Department have a single chief legal officer. They should be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services. Section 139 of Title 10 of the United States Code provides that the General Counsel of the Department of Defense is the chief legal officer of the entire Department of Defense. As such, the General Counsel of the Department of Defense is responsible and accountable to the Secretary of Defense for and has the authority necessary to ensure uniform, proper interpretation and application of the law and delivery of legal services throughout the Department of Defense. The purpose of this memorandum is to provide similarly for a single chief legal officer for each of the Military Departments within the Department of Defense.

Accordingly, pursuant to Title 10, including Sections 113, 3011, 5011, and 8011, and Department of Defense Directive 5105.2, this is to direct effective immediately as follows:

(1) The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense.

(2) The General Counsels of the Military Departments shall be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services within their respective departments.

(3) Civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretary of a Military Department shall be subject to the authority of the General Counsel of that Military Department with respect to the performance of those legal duties.

(4) The General Counsels of the Military Departments shall ensure that civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretaries of the Military Departments comply with applicable statutory, regulatory, and ethical standards of the legal profession in the performance of those duties.

(5) The legal opinions of the General Counsels of the Military Departments shall be the controlling legal opinions of their respective Departments.

(6) The General Counsels of the Military Departments, subject to the authority, direction and control of the

Secretaries of the Military Departments, shall implement this memorandum in a manner consistent with applicable law, including Sections 806, 825, 827, 854 through 870, 873, 874, and 945 of Title 10.

Nothing in this memorandum shall be deemed to create any right in any person not otherwise prescribed by law or regulation.

/s/ D.J. ATWOOD

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